STATE OF MICHIGAN

COURT OF APPEALS

KRIS VANDERMALE and MARCELEE VANDERMALE, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v HARVEY AUTOMOTIVE, INC., d/b/a HARVEY LEXUS OF GRAND RAPIDS, Defendant-Appellant.	UNPUBLISHED June 21, 2005 No. 253100 Kent Circuit Court LC No. 02-09308-CP

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this action brought pursuant to the Michigan Consumers Protection Act (MCPA), MCL 445.901 *et seq.*,[1] plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition and dismissing plaintiffs' claims. We affirm.

Plaintiffs purchased a 2000 Lexus GS400 from defendant. The retail sales installment contract designated the vehicle as "new;" however, the vehicle had nearly 8,000 miles on it as a result of having been both a salesman's vehicle and leased for eight days to a proving ground for evaluation, testing, and other procedures. Plaintiffs negotiated nearly $6,000 off the price of the vehicle because of the mileage. Defendant told plaintiffs that the vehicle had been used as a salesman's car, but not that it has been leased to the proving ground. Plaintiffs sued defendant alleging violations of the MCPA.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that its actions did not violate the MCPA because it properly identified the vehicle as new pursuant to the Michigan dealer act, MCL 445.1561 *et seq.*[2] Defendant also argued that because

[1] Plaintiffs also alleged unjust enrichment; however, on appeal plaintiffs only address the trial court's ruling with respect to their MCPA claims.

[2] MCL 445.1565(1) defines "new motor vehicle" as follows:

(continued…)

plaintiffs testified that they regarded the vehicle as "used," they could not have been misled by the vehicle's designation as "new." Finally, defendant argued it had no duty to account for how each mile accrued on plaintiffs' vehicle. The trial court granted defendant's motion for summary disposition and dismissed plaintiffs' claims.

On appeal, plaintiffs contend the trial court erred in granting summary disposition to defendant. We disagree. We review de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10). *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). We consider the documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs first argue that, by designating the vehicle as "new," defendant violated the MCPA. The MCPA prohibits a seller from "representing that goods are new if they are deteriorated, altered, reconditioned, used, or secondhand" and "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." MCL 445.903(3)(1)(d), (e). At the motion hearing below, plaintiffs argued that the vehicle could not be characterized as "new," in light of MCL 257.33a and MCL 257.24a; while defendant maintained that, under MCL 445.1565(1), it had properly designated the vehicle as "new." However, Kris VanderMale testified that he believed the vehicle he and his wife purchased was used because it had nearly 8,000 miles on it, despite the retail sales installment contract designation of the vehicle as "new." Reliance on the seller's representations is an implicit element of the MCPA. See MCL 445.903(1)(d), (e). Because there is no genuine issue of fact as to whether plaintiffs relied on defendant's designation of the vehicle as new, the trial court did not err in dismissing this claim.

Next, plaintiffs argue that defendant's failure to disclose the manner in which the 8,000 miles were put on the Lexus was a violation of the MCPA. The MCPA prohibits merchants from "failing to reveal a *material* fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer," "making a representation of fact or statement of fact *material* to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is," and "failing to reveal facts that are *material* to the transaction in light of representations of fact made in a positive manner." MCL 445.903(1)(s), (bb), (cc) (emphasis added). "[A] material fact for purposes of the MCPA would . . . be one that is important to the transaction on or affects the consumer's decision to enter into the transaction." *Zine v Chrysler Corp*, 236 Mich App 268, 283; 600 NW2d 384 (1999).

The trial court correctly determined that the manner in which the miles were put on plaintiffs' car was not material to the transaction. The record demonstrates that plaintiffs

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> [A] motor vehicle which is in the possession of the manufacturer, distributer, or wholesaler, or has been sold only to a new motor vehicle dealer and on which the original title has not been issued from the new motor vehicle dealer.

purchased the Lexus knowing that it was used, negotiated a lower purchase price based on the mileage, and did not question defendant about how the miles were put on the vehicle. Further, plaintiffs have failed to demonstrate that defendant had a duty to determine and disclose how the miles were put on the vehicle -- a particularly onerous duty not mandated by the MCPA. Therefore, we conclude that the trial court did not err in dismissing this claim.[3]

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

[3] In light of our resolution of this issue, we need not address the other issue plaintiffs raised on appeal.